

STATE OF VERMONT
PUBLIC SERVICE BOARD

Docket No. 7373

Joint Petition of Vermont Electric Power Company, Inc.,)
Vermont Transco, LLC, and Central Vermont Public)
Service Corporation for a certificate of public good,)
pursuant to 30 V.S.A. Section 248, authorizing the)
construction of the Southern Loop Transmission)
Upgrade Project)

Order entered: 5/16/2008

**ORDER RE: REQUESTS FOR ENLARGEMENT OF TIME,
MOTION TO APPEAR PRO HAC VICE, AND MODIFIED SCHEDULE**

Background and Positions of the Parties

At the December 19, 2007, prehearing conference in this Docket, the parties agreed on a schedule for this proceeding. That schedule was largely adopted by the Public Service Board ("Board") in its Prehearing Conference Memorandum issued on December 26, 2007. Under that schedule, non-Petitioners were to file their direct testimony by May 12, 2008, with the provision that "[t]his filing shall also include the identification of any matters for which the party requires additional time to conduct studies because of seasonal limitations (e.g., seasonally dependent identification of flora or fauna); the direct testimony on such matters may be filed in accordance with the schedule for rebuttal testimony."¹ The schedule required non-Petitioners to file their rebuttal testimony by September 2, 2008.

Two motions have now been filed seeking to modify the dates for non-Petitioners to file their direct and rebuttal testimony. The first, filed on May 5, 2008, by the Agency of Natural Resources ("ANR"), would extend the deadline for non-Petitioners' direct testimony to June 9, 2008, and move up the deadline for non-Petitioners' rebuttal testimony to August 25, 2008; to reflect these new deadlines for non-Petitioners' testimony, ANR's motion proposes further modifications to the schedule. ANR represents that the Department of Public Service supports

1. Prehearing Conference Memorandum, 12/26/07, at 2 n. 3.

the request, and that the Petitioners do not oppose it. Along with its request, ANR also filed a motion for the admission pro hac vice of Michael Steeves.

The second scheduling motion was filed by Carl and Judy Ferenbach on May 6, 2008. The Ferenbachs seek to extend to June 2, 2008, the deadline for their direct testimony "relating to impact upon and delineation of wetlands (not including erosion analysis), determination of potential existence of undisclosed deer yard and amphibian migration corridors" ² (The Ferenbachs also note, in their cover letter, that they do not object to ANR's proposed extension for all non-Petitioners to file direct testimony by June 12.) The Ferenbachs request a further extension, to September 15, 2008, for their direct testimony "pertaining to existence or non-existence of rare plant species, migratory bird and other wildlife patterns, erosion analysis, and the impact on the Simpsonville Swamp eco-system and its connections with the Ferenbach wetland system" ³ In support of their requested extensions, the Ferenbachs assert that their expert witnesses need additional time to conduct sufficient analyses of the matters for which they seek the extensions. With their motion the Ferenbachs submitted affidavits from two of their witnesses.

On May 6, 2008, the Petitioners (Vermont Electric Power Company, Inc., Vermont Transco, LLC, and Central Vermont Public Service Corporation) filed a letter indicating that they do not oppose ANR's proposed amended schedule.

On May 7, 2008, the Clerk of the Board issued a memorandum to the parties informing them that comments on ANR's and the Ferenbachs' motions for enlargement should be filed by noon on May 9, 2008. ⁴

On May 7, 2008, the Petitioners filed a Reply to the Ferenbachs' motion for enlargement. The Petitioners do not oppose the Ferenbachs' requested extension to June 2, 2008, but do object to the Ferenbachs' proposal to defer their other topics to September 15, 2008. According to the Petitioners, the Ferenbachs' requested extension to September 15 is untimely because they have

2. Ferenbachs' Motion for Enlargement at 4.

3. *Id.*

4. The Clerk's memorandum stated that electronic filings would be accepted due to the short timeframe for submitting the comments.

not demonstrated any unexpected change in circumstances in the five months that have passed since the Board, when setting the schedule, addressed the Ferenbachs' possible need for additional time for certain matters.

The Petitioners also contend that the Ferenbachs have not shown good cause for the enlargement in that the Ferenbachs have not established their witnesses' qualifications and, even if such qualifications were demonstrated, those witnesses' affidavits "are vague and conclusory as to why they cannot complete their observations before June 2nd"5 The Petitioners include an affidavit from one of their witnesses on environmental issues; pointing to the affidavit, the Petitioners assert that most of the issues for which the Ferenbachs seek an extension can be addressed prior to June 2. The Petitioners acknowledge that with respect to two species – the Barbed-bristle bulrush and the Three-bird orchid – additional field work may be needed later than June 9, and thus do not object to the Ferenbachs retaining the ability to supplement their testimony by the current rebuttal deadline with respect to those two species.

Finally, the Petitioners assert that they would be prejudiced by the Ferenbachs' requested enlargement to September 15 because that would result in the Petitioners having much less time to review and consider substantial amounts of testimony.

On May 9, 2008, the Towns of Brookline and Dummerston each filed a letter supporting ANR's requested June 9 deadline for non-Petitioners' direct testimony and the Ferenbachs' requested September 15 deadline for supplemental filings. Each town's filing included a copy of a report by a property owner of a sighting of the Three-bird orchid near the project corridor.

On May 9, 2008, the Vermont Land Trust filed comments in support of ANR's and the Ferenbachs' motions for enlargement.

On May 9, 2008, the Clerk of the Board sent an e-mail to the parties informing them that the Board was extending the deadline for non-Petitioners' direct testimony to June 9, 2008, and that the Board would be issuing an order confirming the extension and addressing the remaining issues raised by the motions for enlargement of time.

On May 12, 2008, the Ferenbachs filed comments in response to the Petitioners' Reply. The Ferenbachs indicate that with the June 9 deadline for direct testimony, they no longer need

5. Petitioners' Reply at 5 (emphasis in original).

additional time for the issues related to spotted-salamander migration corridors and overland-flow erosion problems, and they withdraw their requested extension to September 15 for those topics.

The Ferenbachs continue to seek a September 15 deadline for the other topics identified in their motion for enlargement. They contend that their motion was timely, noting that those remaining topics relate in some fashion either to the Barbed-bristle bulrush or the Simpsonville Swamp and related wetlands. The Ferenbachs assert that there would be no undue prejudice to the Petitioners, and that Petitioners' discovery responses indicate a failure by Petitioners to investigate the Ferenbach property for Barbed-bristle bulrush during the appropriate time of year. The Ferenbachs claim that their affiants are qualified, and include résumés of the scientists upon whom their motion relied. In summary, the Ferenbachs identify the following as the topics for which they seek a September 15, 2008, filing deadline:

- (a) existence or non-existence of rare plant species (specifically the Bristle-barbed bulrush and any other species which is not easily identifiable before the June 9, 2008, consented to deadline);
- (b) migratory bird and other wildlife patterns (associated with the impact on the Simpsonville Swamp eco-system and the Ferenbach wetlands that cannot be observed in time for the June 9, 2008, deadline);
- (c) seasonal wildlife occupancy (associated with the impact on the Simpsonville Swamp eco-system and the Ferenbach wetlands that cannot be observed in time for the June 9, 2008, deadline);
- (d) the impact on the Simpsonville Swamp natural community and its eco-system and its connection with the Ferenbach wetland system.⁶

On May 15, 2008, the Petitioners filed a Surreply to the Ferenbachs' motion for enlargement. The Petitioners continue to claim that the Ferenbachs have not shown good cause for the requested extension to September 15. The Petitioners assert that the "fundamental deficiency" in the Ferenbachs' motion remains: "the affidavits offer only vague and conclusory statements, none of which are substantiated or elaborated upon in the Ferenbach Reply."⁷ The Petitioners claim that the Ferenbachs' requested extension would burden the Petitioners greatly

6. Ferenbachs' May 12, 2008, Comments at 11–12.

7. Petitioners' Surreply at 2.

by deferring any testimony on four issues for over two months, giving the Petitioners insufficient time to conduct full discovery and to prepare sufficiently for hearings.

Discussion

There is no dispute among the parties with respect to extending the deadline for non-Petitioners' direct testimony to June 9, 2008, and we confirm that date as the new deadline for such testimony.

The primary dispute is whether the Ferenbachs should be allowed until September 15, 2008, to file any testimony on the four topics that they have identified. We have carefully reviewed the parties' filings, and conclude that, as the Petitioners contend, the Ferenbachs have not provided sufficient justification for such an extension. The affidavits upon which the Ferenbachs rely speak, for the most part, to the inability to complete necessary field work by May 12, 2008, and indicate merely that "a reasonable schedule for the completion of the evaluation of the impacts on the species and natural communities would include observations up to September 15, 2008."⁸ This falls short of establishing, in accordance with the Order setting the schedule for this Docket, that "the party requires additional time to conduct studies because of seasonal limitations (e.g., seasonally dependent identification of flora or fauna)"⁹

This is not to say that some extension is unwarranted. The Petitioners have acknowledged that it would be appropriate for the Ferenbachs to have until the current rebuttal deadline (September 2, 2008) for testimony regarding the Barbed-bristle bulrush and the Three-bird orchid, and we hereby allow the Ferenbachs to file their direct testimony with respect to those two species by September 2, 2008. It may well be that seasonal limitations similarly preclude the completion of necessary field work for other of the topics for which the Ferenbachs seek an enlargement, but the Ferenbachs have not demonstrated that to be the case.

However, we are mindful that this proceeding involves not a purely private dispute, but rather matters that relate to the public good. Thus, the schedule should allow, to the extent

8. Affidavit of Dori Barton at 2, attached to Ferenbachs' Motion for Enlargement.

9. Prehearing Conference Memorandum, 12/26/07, at 2 n. 3.

reasonably practicable, the submission of relevant analyses that are seasonally limited. Accordingly, we strongly encourage the Petitioners, the Ferenbachs, ANR, and any other interested parties to engage in good-faith discussions regarding whether some discrete extension beyond June 9 is appropriate to allow the completion of seasonally limited field investigation.¹⁰ To provide the parties with sufficient time for these discussions, we will grant the Ferenbachs a limited extension, to July 1, 2008, to file their direct testimony on the four topics for which they have requested a September 15 filing deadline, other than the Barbed-bristle bulrush and the Three-bird orchid, which we have addressed in the paragraph above. If the parties do not reach agreement on an appropriate extension, the Ferenbachs may file a renewed motion to extend the deadline beyond July 1; however, any such renewed motion must be filed no later than June 9, 2008, and must be accompanied by a clear and specific demonstration of the seasonal limitations that justify the requested extension.

While we are denying the Ferenbachs' request for an extension to September 15, 2008, we also see no justification to accelerate the deadline (as ANR proposes) for the non-Petitioners to file rebuttal testimony. We thus will retain the existing, September 2, 2008, deadline for non-Petitioners to file rebuttal testimony.

Based on the foregoing, we hereby modify the schedule for this Docket as follows:¹¹

Non-Petitioners' Direct Testimony ¹²	June 9, 2008
1 st Round Discovery on Non-Petitioners	June 19, 2008
Non-Petitioners' Responses to 1 st Round Discovery	July 1, 2008
2 nd Round Discovery on Non-Petitioners	July 7, 2008
Non-Petitioners' Responses to 2 nd Round Discovery	July 14, 2008

10. These possible extensions would relate to the four topics for which the Ferenbachs have requested a September 15 filing deadline, other than the Barbed-bristle bulrush and the Three-bird orchid (for which we are establishing a September 2, 2008, deadline). Any extensions should be specifically tailored to the involved issue; i.e., if the parties agree on extensions for more than one issue, the extensions may be of differing lengths.

11. This schedule accepts the revised deadlines proposed in ANR's Motion for Enlargement, up to (but not including) ANR's proposed accelerated deadline for non-Petitioners' rebuttal testimony.

12. This filing shall also include the identification of any matters for which the party requires additional time to conduct studies because of seasonal limitations (e.g., seasonally dependent identification of flora or fauna); the direct testimony on such matters may be filed in accordance with the schedule for rebuttal testimony.

Petitioners' Rebuttal Testimony	July 28, 2008
Discovery on Petitioners' Rebuttal	August 4, 2008
Petitioners' Responses to Discovery	August 18, 2008
Non-Petitioners' Rebuttal Testimony	September 2, 2008
Discovery on Non-Petitioners' Rebuttal	September 15, 2008
Non-Petitioners' Responses to Discovery	September 29, 2008
Technical Hearings	October 15–22, 28–31, November 3, 5–10, 2008
Briefs	December 3, 2008
Reply Briefs	December 21, 2008

Finally, we turn to ANR's motion to admit Mr. Steeves pro hac vice. No party has objected, and the motion is hereby granted.

SO ORDERED.

Dated at Montpelier, Vermont, this 16th day of May, 2008.

<u>s/James Volz</u>)	PUBLIC SERVICE
)	
)	
<u>s/David C. Coen</u>)	BOARD
)	
)	
<u>s/John D. Burke</u>)	OF VERMONT

OFFICE OF THE CLERK

FILED: May 16, 2008

ATTEST: s/Susan M. Hudson
Clerk of the Board

NOTICE TO READERS: This decision is subject to revision of technical errors. Readers are requested to notify the Clerk of the Board (by e-mail, telephone, or in writing) of any apparent errors, in order that any necessary corrections may be made. (E-mail address: psb.clerk@state.vt.us)